[redacted]

No. 499

[redacted]

FRANK TENNYSON NEELY,

[redacted]

[redacted]

INDEX.

Subject Index.

	Page
Petitioner's reply brief	1
I. Answering respondents' statement (pp. 5-9)	1
A. Petitioner's status	1
B. Parol testimony of the contract	3
C. The memorandum of October 15, 1925	7
D. The witnesses below	8
E. The special master's report	10
II. Answering respondents' argument (pp. 12-39)	12
A. Respondents' statement of the contract as an established and important fact constitutes a solemn judicial admission and estops a subsequent shift of position	12
B. Specific performance will be decreed under the State law where the contract is not in issue, is judicially admitted and is established by the will and by parol evidence	13
C. Petitioner performed over the life of the contract to the promisor's complete satisfaction	14
Conclusion	15

Table of Cases Cited.

Alexander v. *Lewes*, 104 Wash. 32	15
Allen v. *U. S. F. & G. Co.*, 269 Ill. 234	12
Allison's estate, In re, 106 N. J. Eq. 55	12
Beaver v. *Crump*, 76 Miss. 34	14
Berg v. *Moreau*, 199 Mo. 416	15
Brinton v. *Van Cott*, 8 Utah 480	15
Burdick v. *Grimshaw*, 113 N. J. Eq. 591	14
Burdine v. *Burdine's Exr.*, 98 Va. 515	15
Burmeister v. *Hamman*, 208 Ia. 412	15
Burns v. *Smith*, 21 Mont. 251	15

Page

Christy v. *Atchison, T. & S. F. Ry. Co.*, 233 Fed. 255 13
Christy v. *N. Y. Cent. & H. R. R. Co.*, 90 N. J. L. 540 12
City and County of Denver v. *Denver Union Water Co.*, 246 U. S. 178 11
Clark & Wilson Lumber Co. of Delaware v. *McAllister*, 101 F. (2d) 709 13
Clark's Appeal, 57 Conn. 565 15
Cleaves v. *Yeskel*, 114 N. J. L. 497 12
Cooper v. *Colson*, 66 N. J. Eq. 328 14
Davis v. *Wakelee*, 156 U. S. 680 12
Franke Mfg. Co. v. *Jefferson Electric Co.*, 106 F. (2d) 605 13
Haberman v. *Kaufer*, 70 N. J. Eq. 381 14
Illinois Cent. R. Co. v. *Norris*, 245 Fed. 926 13
Johnson v. *Wehrle*, 9 N. J. Misc. 939 14
Kelley v. *Devin*, 65 Ore. 211 15
Laune v. *Chandless*, 99 N. J. Eq. 186 13
Lings v. *Urquhart*, 106 N. J. Eq. 506 14
Lovett v. *Lovett*, 87 Ind. App. 42 15
Marsh v. *Mitchell*, 26 N. J. Eq. 497 12
Merlis v. *G. & M. Corporation*, 143 Atl. 139 15
McNamara v. *Bohn*, 108 Atl. 764 14
McTague v. *Finnegan*, 54 N. J. Eq. 454 14
Neely v. *Stacy*, 288 U. S. 606 12
Oscanyan v. *Arms Co.*, 103 U. S. 261 12
Safford v. *Barber*, 74 N. J. Eq. 352 15
Scaife v. *Western North Carolina Land Co.*, 90 Fed. 238 13
Schutt v. *Missionary Soc.*, 41 N. J. Eq. 115 15
Scott v. *Beole*, 111 N. J. Eq. 215 14
Smith v. *McHenry*, 111 Kan. 659 15
The E. A. Packer, 140 U. S. 360 11
United States v. *Stevens*, 302 U. S. 633 15
Vreeland v. *Vreeland*, 53 N. J. Eq. 387 13
Weyer v. *Weyer*, 106 N. J. Eq. 112 14

TEXT BOOKS CITED.

1 Greenleaf: Evidence (16th Ed.), Sec. 186, p. 314 12
Jones: Evidence (4th Ed.), Sec. 257, p. 489 12
9 Wigmore: Evidence (3d Ed.), Secs. 2588, 2590, 2591, 2593, 2594 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 499

FRANK TENNYSON NEELY,

Petitioner,

vs.

MERCHANTS TRUST COMPANY OF RED BANK, NEW JERSEY, AS ADMINISTRATOR OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, AND FREDERICK H. TARR, AS ANCILLARY ADMINISTRATOR IN THE STATE OF MASSACHUSETTS OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, AND MARY L. HODGKINS, HARRIET G. STACY, JAMES D. STACY, FANNY K. STACY, MARY S. STACY, ANNA S. LUFKIN, GILBERT C. McCORMICK, HARRY McCORMICK, LOLA ROBINSON, HETTIE M. MORSE, JENNIE M. SAYWARD, CLIFFORD E. STACY, FRED C. STACY, EVERETT STACY, WILLIAM A. HAMILTON, DORIS ALVORD, ALBERT J. McCORMICK.

PETITIONER'S REPLY BRIEF.

I.

Answering Respondents' Statement (pp. 5-9).

A. PETITIONER'S STATUS

The respondents throughout their brief have studiously endeavored to place the petitioner in the worst possible

light. Toward that end they have attempted to create the impression that he had always been a failure and that his business experience was unsavory.

We submit that the petitioner certainly has nothing to be ashamed of in his business record. Having been in business for many years, in the course of which the nation as a whole suffered several business depressions, Mr. Neely likewise had his ups and downs. But his record proves conclusively that he had real business acumen and that he knew how to manage investments.

Mr. Neely entered the publishing business in Chicago in 1883, later removing to New York where he developed an extensive business of publishing text books and the works of many prominent authors and served on a national publisher's committee (R. 163, 374, 1469-70). In 1899 his business was forced into bankruptcy, from which he was discharged in 1901 (R. 374-6, 1871-2). He thereupon entered a manufacturing business, which was forced into bankruptcy because of alleged patent infringements in 1903, but because the petition, through error, was made voluntary, he did not secure his discharge until 1917 (R. 375-6, 1471-3, 1872-3). Thereafter he was associated with the real estate house of S. Osgood Pell & Co., in New York, leaving it in 1916 to enter business for himself in the handling of large properties (R. 38-40, 377-9, 1339, 1474-9). By 1918, he had $44,000 of deposits in Boston (R. 834, 1933); in 1920 he deposited $16,937.20 in his New York account and purchased $11,000 of bonds (R. 1827, 1837). Between September 16, 1921, and July 11, 1922, he acquired $83,000 of bonds at Dillon-Read, of which he retained $35,000 after sales and cash withdrawals over this period of $10,770.08 (R. 1911). On November 16, 1921, he also purchased $8,600 of bonds from one Dilkes (R. 833-4, 1299, 1418, 1896). Over the period 1917-1920,

he also earned substantial commissions as coal broker, including one for $35,000 (R. 176-7, 377-80, 860-2, 1479-82). He was a member of numerous clubs. He had known Mr. Calef in his lifetime and had frequently visited at Sea Bright (R. 1160, 1468).

B. Parol Testimony of the Contract

The respondents have attacked the sufficiency of the petitioner's evidence of the contract between him and the decedent. At page 7 of the respondent's brief, it is expressly said:

> "* * * No witness stated definitely that Mrs. Calef had confirmed any precise agreement or arrangement with Neely. Other witnesses quoted her words which substantiated the statement that she never made any such contract."

Such a statement is not understandable in view of the many places in the Record in which witness after witness testified to the decedent's confirmation of her contractual arrangement with the petitioner.

Mrs. Clark testified, decedent told her in September 1921:

> "'* * * I have no money and yet he is helping me tremendously and I can't pay him' * * * that finally she had been able to arrange with Mr. Neely to take care of her affairs and look after her, * * * that the only way she could pay him was by looking out for his care and comfort and remembering him in her will, giving him—making it in his favor, making a will in his favor. She said 'I am going to make a will in Mr. Neely's favor and he is going to take care of me,' as I understood, for life, or forever, and make his home there, * * *" (R. 121, 694-5).

Petitioner testified on *cross examination by respondents* that on September 10, 1921, decedent gave him her written declaration (R. 1770):

> "* * * carrying out her proposal and agreement that if I would take care of her business and look after her business, she would compensate me by my having the deed to the house, and she would make a will giving me the property" (R. 1382).

Runyon testified that on September 16, 1921, when he took her acknowledgment to the deed, petitioner told him:

> "* * * she wanted to make—to deed the house over to Mr. Neely so that he could handle it, and also to make a will in his favor in view of the various things that had taken place." (R. 428).

Hume testified decedent told him a few days thereafter:

> "* * * She stated that owing to the fact that she had very little money at that time, she was not able to pay him for the services that he was performing for her and that therefore she desired all the property that she might have to go to him upon her death as compensation for the services that he was rendering for her. * * *" (R. 68).

The clause in the will naming petitioner residuary legatee "in return for his services rendered to me at a time when I most needed them" was drafted by the decedent herself (R. 202, 70).

Petitioner testified Hume told decedent in his presence on September 29, 1921:

> "* * * that she had told him that she was making this will under contract or a promise which she had made with me that she would make the will; that she wanted the will to so state explicitly that the will was made—or that she was making the will for the services which I had already rendered to her and had

promised to render to her in the future" * * * she said that is exactly the way she wished it." (R. 1291).

Mrs. Colony testified decedent told her in the winter of 1921-22:

> "She gave me to understand that there was very little left, and what there was was to go to Mr. Neely * * * She definitely said that Bagdad[1] was to go to Mr. Neely. * * * That's all she had left * * * at that time". (R. 51).

Avery, in response to the Court's question as to his recollection of anything "that would lead you to the conviction that they had come to an agreement with relation to each other's estates and particularly with relation I would say to remuneration by her to him for services rendered," testified:

> "There was Mrs. Calef's statement on at least two occasions and Mr. Neely's statement on one occasion when Mrs. Calef was present that they had executed reciprocal wills" (R. 183-4).

Warner testified that on June 9th or 10th, 1924, decedent told him:

> "* * * that she had no way of paying Mr. Neely for the services which he had rendered and could render in the future except by making a will and leaving her estate to him, which she said she had done * * * For the valuable services that he had rendered and was continuing to render to her" (R. 294-5).

Warner urged them on July 4, 1924, to go to California with him. He testified:

> "* * * she said it would be impossible for him to go because she had made an agreement with him to look after her affairs" (R. 296).

---

[1] Decedent's home at Sea Bright, N. J.

Greer testified that decedent told him in the winter of 1925-26, in Florida:

> "* * * Mrs. Calef just volunteered the information that Mr. Neely had been a Godsend to her, she used that word, and that he had taken care of affairs, that they were badly mixed up, and that he had even loaned her money to meet obligations—she didn't mention any particular amount and that she had agreed with him and had made her will * * * in his favor. * * * she said that would compensate * * * him for all the work that he had done for her and the money that he had loaned her" (R. 358).

Mrs. Cochran testified decedent told her that winter:

> "* * * that she had an agreement with Mr. Neely, and he was to manage her affairs and take charge of her business and in turn she had made her will, giving him her property * * * she had agreed to make this will and give him her estate" (R. 659-60, 674-6).

Wilcox testified decedent told him in the summer of 1928:

> "'I do not know how I can ever repay him for all that he has done for me. * * * I have made a will leaving everything to Mr. Neely, as he is the one person who I feel is doing so much for me." (R. 198).

Wilcox further testified:

> "It was done because she felt she owed him for the work that he had done. *The Court:* For services? *A.* For services that he had rendered, yes. *The Court:* Yes. And therefore she made the will? *A.* Yes" (R. 199).

Avery testified decedent told him in September 1928:

> "* * * that there was no way in which she could pay him for what he had done, she feared he wouldn't be paid, that he was mentioned in her will * * * She repeatedly stated, but particularly on this occasion, that she was under the deepest obligation." (R. 183).

Mrs. Clark testified decedent told her in June 1929:

> "He has been a port in every storm" (R. 148).

Miss Fahrner testified decedent told her, with regard to her property:

> "* * * she felt that she should leave it to him because that was the only way she could repay him" (R. 235).

Respondents' present counsel (Mr. Parsons) stated in his brief filed in the New Jersey Prerogative Court in June, 1931:

> "'The following facts appear at the close of the proponent's case: 1. Mrs. Calef executed deed on September 16th, 1921, pursuant to contract with Neely that she would give him deed, make him residuary legatee in will in consideration of his past, present and future services to her and money advanced to her.'" (R. 1825-6).

Mr. Parsons again stated in his brief filed in the New Jersey Court of Errors and Appeals in June, 1932:

> "* * * a brief synopsis of *the important facts which have been established of the whole case* may be helpful. * * * 3. September 16, 1921. Mrs. Calef executes a deed for her property at Sea Bright to Neely *pursuant to contract with him to give him deed and make him residuary legatee in consideration of services and money advanced to her.* * * *" (R. 1824.)

C. The Memorandum of October 15, 1925 (R. 1073, 1897).

Throughout the respondents' brief by innuendo and by direct accusation, it is made to appear that the petitioner improperly appropriated to his own use large sums of the decedent's money. Particular reference is made at pages 6 to 7 of the respondents' brief to a "note" given by the petitioner to the decedent in which the petitioner certified to the receipt of $17,000 which he agreed to pay back.

A statement of the actual facts surrounding this transaction will clearly demonstrate that petitioner did nothing improper in regard to it.

On her husband's death in 1914, decedent acquired 200 shares of Richmond Ry. L. & P. Co. stock which he had purchased in 1911 for $4050 (R. 1112). As requested, petitioner effected their sale for her on October 23, 1923, for $13,992 net, or a profit of approximately $10,000 (R. 712-4, 1112). Decedent gave him the proceeds for investment on the understanding that he would repay her at the rate of $500 monthly, as she did not trust her judgment (R. 712-13, 844-7, 905, 936-41, 1044-9, 1400-1, 1897, 1969). At least $9200 was so repaid (R. 847, 1046, 1897-9), and the arrangement was confirmed in writing on October 15, 1925 (R. 1073, 1897). On that date, decedent paid petitioner $5000 "for contemplated speculations in Florida" (R. 1073, 1897). Over the objections of petitioner and Greer, decedent personally invested $4000 of this sum in a land development and lost it despite petitioner's efforts at collection (R. 356-7, 929-30, 1002-4, 1895-6). He then personally reimbursed her for half of her own loss and refunded the unexpended balance of $1000 (R. 929-30, 1002-4).

D. The Witnesses Below.

Respondents' attack on the adequacy of petitioner's evidence is difficult to understand in view of the meagreness of the testimony on behalf of the respondents and the quantity and high quality of the proof on behalf of the petitioner.

Only one of respondents' twenty witnesses (Johnson) testified to anything bearing even remotely on the contract, and respondents conceded the others were immaterial (R. 1560). Johnson stated (in 1937) that petitioner, in response to an impertinent question, told him at some

unspecified date sixteen years earlier (in 1921) that he relied on decedent's "generosity" as his compensation (R. 555).[2] There was no denial from decedent's lips of her contractual obligation.

The high calibre of petitioner's proof cannot be questioned: Coffin was president of S. Osgood Pell & Co. since 1913 (R. 39); Mrs. Colony, a grandniece of decedent (R. 40); Colony, the decedent's favorite and a war veteran (R. 61); Hume, an associate of Elihu Root and corporation counsel of Yonkers (R. 1187); Field, a member of the New York bar since 1888 (R. 99); Mrs. Castell, a next door neighbor in 1929 (R. 105); Mrs. Clark, the decedent's closest companion over the period 1916-1924 (R. 111-12, 125); Avery, a member of the New York bar and next door neighbor over the period 1922-1929 (R. 148-9, 154); Andreiev, a former army officer and the decedent's butler in 1928-29 (R. 188-9); Wilcox, a retired business man and member of the War Trade Board (R. 194); Mrs. Gorman, Hume's secretary for many years (R. 206); Williams and Keeler, public officials in New Jersey (R. 212, 215); Maxson, former New Jersey Banking Commissioner (R. 220); Miss Fahrner, the decedent's seamstress and companion over the period 1894-1929 (R. 226); Mrs. Richard, a friend over the period 1920-1929 (R. 269-70); Warner, brother-in-law of Mayor John Purroy Mitchell of New York and engineer for the New Haven, Erie, New York Central and Great Northern Railroads, the United Verde Copper Co. and the State of California (R. 291); Greer, a member of the bar and Florida business man (R. 354, 369); Runyon, the partner of former Governor Woerz of New Jersey (R. 1512); Mrs. Cochran, the daughter of a Judge

---

[2] Respondents' counsel, on the oral argument in the Circuit Court of Appeals on March 18, 1940, stated that Johnson, subsequent to his testimony, pleaded guilty to embezzlement and had been sentenced to State's prison.

of the Kentucky Supreme Court (R. 655); Whitford, a household employe from 1893 to 1927 (R. 678-9); Braverman, a certified public accountant and chief examiner for the Department of Insurance and Banking of New Jersey (R. 737); Tarr, United States District Attorney for Massachusetts and a respondent (R. 277); Fuller, the partner of Mr. Justice Church, formerly of the New York Supreme Court (R. 1083).

E. The Special Master's Report.

The respondents have not only referred to the finding by the master that the petitioner had not accounted for some $41,000 of decedent's funds (respondents' brief, page 7), but also set forth in the appendix to their brief excerpts from the master's report (respondents' brief, pages 51-54).

We submit that there was absolutely no justification for the Order of Reference to a master, made by the District Judge on March 31, 1937 (R. 735).

When the defendants filed their Answer, it included a counterclaim. At the close of the case, counsel for the defendants abandoned the counterclaim. See R. 1154.

Nevertheless, hundreds of pages of testimony were taken by a master who interpreted Judge Fake's Order to mean that the plaintiff was under a duty to account *as trustee* for every dollar and every piece of property of Mrs. Calef which ever passed through his hands. Nothing could be more unfair.

Obviously, it was not the intention of the decedent that Mr. Neely should ever be called upon for such an accounting. No reasonable construction of the evidence could lead to any other conclusion.

Indeed, Judge Fake covered the situation completely during argument at R. 1586, where the following colloquy occurred:

"*The Court:* Do you cover a point like this in your argument or brief: 'The mere fact that he is unable to account with exactness might indicate corroboration of the fact that there was just such an agreement'.

"*Mr. Parsons:* I don't cover that at all.

"*The Court:* In other words, Mrs. Fake knows that everything I have goes to her, and we don't keep any accounts, one against the other. Therefore, when the master reports inability to account with exactness but nothing in the nature of what might be termed embezzlement, why isn't it all tending to corroborate there was such a contract?"

But even in the proceedings before the master, in which events going back sixteen years were examined, the petitioner fully bore his burden of proof.

Petitioner produced uncontradicted documentary proofs of payments by him to or for the decedent's account over the period 1921-1929 inclusive, aggregating $55,598.09, of which the master allowed only $1354.38, although respondents offered no contrary proofs whatsoever.

Petitioner duly filed 46 specific exceptions to the report (R. 1138-51), not one of which was ever ruled upon below. The District Court disregarded its plain duty in this regard: *City and County of Denver* v. *Denver Union Water Co.*, 246 U. S. 178; *The E. A. Packer*, 140 U. S. 360, 364-5; and the report was not even mentioned by the Circuit Court of Appeals.

The District Court did find that as a result of petitioner's efforts, decedent received cash distributions of $48,500 in 1929, and her Massachusetts real property was sold for $60,000 more than she had originally desired (R. 1705-6). There was no conflicting evidence or challenge anywhere of this finding, and respondents consequently twice conceded that performance was not an issue (R. 1153-4, 1583).

II.

Answering Respondents' Argument (pp. 12-39).

A. Respondents' Statement of the Contract as an Established and Important Fact Constitutes a Solemn Judicial Admission and Estops a Subsequent Shift of Position.

Respondents, at pages 26 to 28 of their brief, insist that the contract between the petitioner and the respondents was in issue and was not admitted as had originally been found by the District Judge. We respectfully refer the Court to our petition for writ of certiorari, pages 13 to 14, in which we have set forth the erroneous action of the District Court in ignoring its prior order to the effect that the contract had been admitted. That order was plainly correct in law and in justice.

Respondents' admission of the contract was not made as loose argument but as the solemn representation of an important fact "established of the whole case" in the highest state court in an attempt to sustain the defense of undue influence[3] in procurement of the will, and to petitioner's prejudice (R. 1824). They cannot now repudiate it as made in a printed brief by their present counsel: *Allen* v. *U. S. F. & G. Co.*, 269 Ill. 234, 241; *Jones: Evidence* (4th ed.) Sec. 257, p. 489; 1 *Greenleaf: Evidence* (16th ed.) Sec. 186, p. 314; 9 *Wigmore: Evidence* (3rd ed.) Secs. 2588, 2590, 2591, 2593, 2594. This is the rule of this Court: *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 263; *Davis* v. *Wakelee*, 156 U. S. 680, 689; and of the courts of New Jersey: *In re Allison's Estate*, 106 N. J. Eq. 55, 64-5; *Marsh* v. *Mitchell*, 26 N. J. Eq. 497; *Cleaves* v. *Yeskel*, 114 N. J. L. 497; *Christy* v. *N. Y. Cent. & H. R. R. Co.*, 90 N. J. L. 540,

[3] See *Neely* v. *Stacy et al.*, 288 U. S. 606, No. 622, October Term, 1932, at R. 17-20.

543. It is also the rule of the Fourth, Sixth, Seventh, Eighth and Ninth Circuit Courts of Appeal: *Scaife* v. *Western North Carolina Land Co.,* 90 Fed. 238, 240-241 (C. C. A. 4th); *France Mfg. Co.* v. *Jefferson Electric Co.,* 106 F. (2d) 605, 610, (C. C. A. 6th); *Illinois Cent. R. Co.* v. *Norris,* 245 Fed. 926, 931 (C. C. A. 7th); *Christy* v. *Atchison, T. & S. F. Ry. Co.,* 233 Fed. 255 (C. C. A. 8th); *Clark & Wilson Lumber Co. of Delaware* v. *McAllister,* 101 F. (2d) 709, 713 (C. C. A. 9th).

B. Specific Performance Will be Decreed Under the State Law Where the Contract Is Not in Issue, Is Judicially Admitted and Is Established by the Will and by Parol Evidence.

Respondents' statement of the law as to the enforceability of contracts such as that involved in this case, is based on cases which themselves prove the inapplicability of that statement of law to the facts of the present case.

Respondents' eleven local cases (brief pp. 16, 36) do not dispute the law as stated in the Petition for Writ of Certiorari. In two cases (*Vreeland* v. *Vreeland,* 53 N. J. Eq. 387 and *Laune* v. *Chandless,* 99 N. J. Eq. 186) specific performance was decreed on facts closely parallel to those here. In the *Laune* Case, where (as here) decedent executed a defective will setting forth the promised devise "In consideration for services rendered in keeping house for me since the death of my wife without any compensation", the Court said (p. 188):

> "* * * It is true that human ingenuity can devise by hypotheses to account for the creation of the instrument by reason of some other motive, but matters of judgment are not formed upon such a basis, as Lord Chancellor Thurlow said in *Fox* v. *MacKreth* 2 *Cox* 320. By every dictate of reason and common sense it is

> more likely that the decedent executed what he meant to be a will because he was under moral and legal obligation so to do."

In nine of respondents' cases (*McTague* v. *Finnegan*, 54 N. J. Eq. 454; *Cooper* v. *Colson*, 66 N. J. Eq. 328; *Haberman* v. *Kaufer*, 70 N. J. Eq. 381; *Weyer* v. *Weyer*, 106 N. J. Eq. 112; *Lings* v. *Urquhart*, 106 N. J. Eq. 506; *Scott* v. *Beola*, 111 N. J. Eq. 215; *Burdick* v. *Grimshaw*, 113 N. J. Eq. 591; *Johnson* v. *Wehrle*, 9 N. J. Misc. 939; *McNamara* v. *Bohn*, 108 Atl. 764) the alleged agreement rested *entirely* in parol, and in most of them was not even established by parol evidence. Three cases involved adopted children (*McTague* v. *Finnegan, Burdick* v. *Grimshaw, Scott* v. *Beola*); two involved natural children who are presumed in law to render services from filial devotion and duty (*Haberman* v. *Kaufer, McNamara* v. *Bohn*); two involved the mere continuation of routine duties by household servants who had an adequate remedy at law on *quantum meruit* (*Cooper* v. *Colson*: *Johnson* v. *Wehrle*). None is relevant here.[4]

C. Petitioner Performed Over the Life of the Contract to the Promisor's Complete Satisfaction.

The respondents, at pages 23 to 25 of their brief, again attack petitioner's performance under his contract with the decedent.

In this connection it is only necessary to cite decedent's repeated expressions of gratitude, satisfaction and solicitude for petitioner in the last year of her life, after the nine years of his faithful and uninterrupted performance (B. Avery, R. 160-1, 182-3; Tarr, R. 276, 281, 283; R. Field, R. 267-8; Mrs. Clark, R. 131, 148; Mrs. Castell, R. 107; Run-

---

[4] *Beaver* v. *Crump*, 76 Miss. 34, 59, involved an adoption agreement to devise to the promisee "what he did not devise or bequeath to others," and is obviously without application.

yon, R. 429; Andreiev, R. 193-4; Fuller, R. 1087-8; Miss Fahrner, R. 235, 243). She was the sole judge; no one else could question the adequacy of petitioner's performance (*United States* v. *Stevens,* 302 U. S. 633; *Schutt* v. *Missionary Soc.,* 41 N. J. Eq. 115).[5] By her own statements, he had fully performed; by respondents' own cases, he was consequently entitled to a decree (*Safford* v. *Barber,* 74 N. J. Eq. 352, 362-3;[6] *Merlis* v. *G. & M. Corporation,* 143 Atl. 139).

Conclusion.

To reply to all the misstatements of fact and law in respondents' brief would require us to far exceed the proper limits of a reply brief before this Court. We, therefore, respectfuly request the Court to refer to the petition for writ of certiorari wherein most of the respondents' arguments have been answered in advance.

Petitioner respectfully submits that he is entitled to a writ of certiorari addressed to the United States Circuit Court of Appeals for the Third Circuit, to review and reverse the final judgment in this cause.

Respectfully submitted,

Wm. A. Schnader,
Albert G. Avery,
George Gordon Battle,
Attorneys for Petitioner.

---

[5] See also: *Clark's Appeal,* 57 *Conn.* 565, 572; *Lovett* v. *Lovett,* 87 Ind. App. 42; *Burmeister* v. *Hamman,* 208 Ia. 412, 416; *Smith* v. *McHenry,* 111 Kan. 659, 665; *Berg* v. *Moreau,* 199 Mo. 416, 436; *Burns* v. *Smith,* 21 Mont. 251; *Kelley* v. *Devin,* 65 Ore. 211; *Brinton* v. *Van Cott,* 8 Utah 480, 487; *Burdine* v. *Burdine's Exr.,* 98 Va. 515, 522; *Alexander* v. *Lewes,* 104 Wash. 32, 42.

[6] Cited by respondents as *Gifford* v. *Barber.*